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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

TROY V. POST, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

BILL M. ALLEN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

LEROY W. PICKETT, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Troy V. Post, Jr., Bill M. Allen and Leroy W. Pickett pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgments of conviction entered by the United States District Court for the District of Columbia on January 6, 1967.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet officially reported, is printed herein as Appendix A.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the convictions was entered on October 15, 1968. No petition for rehearing was filed. On November 6, 1968, the Chief Justice endorsed an order extending the time for filing a petition for a writ of certiorari to and including December 14, 1968. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a supplemental jury instruction patterned after that in *Commonwealth* v. *Tuey,* 8 Cush. 1 (Mass. 1851), as approved in *Allen* v. *United States,* 164 U.S. 492 (1892), conflicts with currently accepted principles of the jury system.

2. Whether a so-called "promotor instruction", to the effect that if the jury found the defendants to be "promotors" of Lakewood Country Club, Inc., the fiduciary obligation of promotors applied and that any violation of such fiduciary obligations would violate 18 U.S.C. §1341, improperly lessens the government's burden of proof in a criminal case. Whether the use of such an instruction, and its approval by the Court of Appeals, conflicts with the holding in *Epstein* v. *United States,* 174 F. 2d 765-766 (6th Cir. 1949).

3. Whether, after the government had shown the diversion of large sums of money to other enterprises,

the exclusion by the trial judge of evidence relating to the return of over $100,000 to the Lakewood Country Club, Inc. complex presented such a distorted picture as to call for a new trial.

STATEMENT OF THE CASE

The petitioners were indicted June 23, 1964, in twenty counts of mail and wire fraud, 18 U.S.C. §§ 1341, 1342 and conspiracy, 18 U.S.C. § 371, arising from the organization, financing, construction, operation and ultimate financial collapse of the Lakewood Country Club complex in Rockville, Maryland.

The District of Columbia, in common with many other areas of the country in the late 1950's, was undergoing a golf explosion and the petitioners conceived the idea of forming and organizing a golf and country club complex which they would own, which would be managed professionally and the profits of which would enure to them. Through local realty firms, they sought a tract of land adequate in size and sufficient in geographic features within close proximity of the District of Columbia on which to locate such club. They finally located approximately 200 acres of such land in Montgomery County, Maryland, and acquired an option to lease the land and, ultimately, to purchase it.

Petitioners' promotional crusade, as the Court of Appeals observed, "met instant and spectacular success, garnering membership fees aggregating more than $1,250,000". (A.-4a) Construction of the club's facilities got under way and the petitioners, acting through wholly-owned corporations, made profits on a land lease to the club and on contracts for the construction of its facilities. (A.-5a, n. 10) During a 20-month

period, they were also paid salaries, commissions and fees pursuant to a variety of intracorporate arrangements. In addition, they advanced monies collected for initiation fees to other country clubs in which they were financially interested. The evidence fairly permits of the conclusion that the club membership was unaware of the extent of petitioners' ownership in the country club complex and the degree to which they were profiting from it.

In the fall of 1960, the club's funds were exhausted and all other facilities being virtually completed, construction on its clubhouse came to a halt. Estimates varied from 60-80% as the extent of completion. A membership meeting in December of that year culminated in the election of a new board of directors which, during the next several months, endeavored unsuccessfully to negotiate an accord with petitioners, Finally, in March, 1961, suit was filed in the United States District Court for the District of Columbia seeking a conservatorship, the ouster of petitioners, and the recepture of monies claimed to have been wrongfully diverted. A conservator was appointed for all of the corporations involved in the affair, and the petitioners were prohibited from further operation of the club. Thereafter, in February 1962, the litigation was settled by a consent order. (A.-6a, 15a-17a)

The indictment leading to petitioners' convictions charged, in substance, material misrepresentations associated with the sale of memberships, including the use of the names of advisory committee members (the advisory committee being "generally nonfunctional", A.-3a), statements as to the "limited number" of life memberships and their nonassessable character (see A.-6a), and the nondisclosure of petitioners' interests

in and profits from the club. At trial, the core question, as in most mail fraud cases, was whether Lakewood Country Club was, as the Government contended, a scheme to defraud prospective members or, as petitioners insisted, a legitimate business venture that unexpectedly and unfortunately failed.

Trial in this case lasted thirty-four days, extending over more than an eight-week period. More than two score witnesses testified, both for the Government and for the defense. The defendants, themselves, testified at some length. Hundreds of exhibits were introduced on both sides. The jury deliberations extended for more than twenty hours over a four-day period. They returned once to have the entire charge re-read and, again, to report their inability to agree. Over the objection of defense counsel, the trial judge gave the instruction from *Commonwealth* v. *Tuey,* 8 Cush. 1 (Mass. 1851). The jury returned some five hours later and convicted each petitioner on the conspiracy count and thirteen substantive counts.[1]

REASONS FOR GRANTING THE WRIT

1. This case presents in sharp focus the question of the continuing validity of the so-called "Allen charge", originally approved by this Court in *Allen* v. *United States,* 164 U.S. 492 (1896). The Court below did not discuss the "Allen charge", having reaffirmed its continuing validity in the precise form here used in *Fulwood* v. *United States,* 369 F. 2d 960, 963 (D.C. Cir. 1966), decided after the convictions here but before argument of the appeal (A.-3a, n. 3).

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[1] The petitioners were acquitted on four counts and three counts were either withdrawn or dismissed at the conclusion of the Government's case.

This Court has not taken the opportunity to speak on *Allen* at any length this century. In *Burton* v. *United States,* 196 U.S. 283, 306-308 (1905), *Allen* was approved by implication but the particular charge given in that case was held to call for reversal. *Lias* v. *United States,* 284 U.S. 584 (1931), was a *per curiam* affirmance, citing *Allen.* *Jenkins* v. *United States,* 380 U.S. 445 (1965), was reversed upon a virtual concession by the Solicitor General. And, in *Kent* v. *United States,* 383 U.S. 541, 552 (1960), the "Allen charge" point was not reached as the case was reversed on other grounds. Indeed, the Court has been singularly silent since *Allen.* But, the rumbling of discontent can be heard from below. State courts, individual federal judges, the authors and, most recently, a distinguished committee of the American Bar Association have re-evaluated *Allen* and condemned its use. Circuit Judge Coleman, concurring in *Thaggard* v. *United States,* 354 F. 2d 735, 739 (5th Cir. 1965), ventured the opinion:

> "I entertain the thought that if it [the 'Allen charge'] were submitted to the Supreme Court today the result might not be the same as it was in 1896."

The highest courts of at least two states have recently indicated that the "Allen-charge" is no longer to be used. *State* v. *Randall,* 137 Mont. 534, 353 P. 2d 1054 (1960); *State* v. *Thomas,* 86 Ariz. 161, 342 P. 2d 197 (1959).

In *State* v. *Thomas, supra,* the Supreme Court of Arizona wrote:

> "We are convinced that the evils far outweigh the benefits, and decree that its use shall no longer be tolerated and approved by this court." 86 Ariz., at 166, 342 P. 2d, at 200.

Lower federal court judges, too, have had recent occasion, albeit in dissenting opinions, to decry to continuing use of the "Allen-charge". Circuit Judge Brown, dissenting in *Huffman* v. *United States,* 297 F. 2d 754, 755-759 (5th Cir. 1962), observed:

> "The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge.
>
> * * * *
>
> "The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost of fundamental fairness is too great."

Again, dissenting in *Walker* v. *United States,* 342 F. 2d 22, 28 (5th Cir. 1965), he wrote:

> "It is high time we repudiate the use of the Allen charge. It is high time we remove the dynamite as an inducement to the awesome judicial responsibility of a jury verdict on which a man's life, his liberty, his freedom rests."

Circuit Judge Wisdom, dissenting in *Andrews* v. *United States,* 309 F. 2d 127, 129 (5th Cir. 1962), has observed:

> "The Allen charge causes more troubles in the administration of justice than it is worth."

And, see Circuit Judge Coleman's concurring opinion in *Thaggard* v. *United States, supra.* Even those courts which have approved the "Allen-charge", seemingly with some reluctance, have used the occasion for some critical observation about its use. *Green* v. *United States,* 309 F. 2d 852, 854 (5th Cir. 1962) ("There is small, if any, justification for its use."); *United States*

v. *Rogers,* 289 F. 2d 433, 435 (4th Cir. 1961) (" . . . the Allen-charge itself, approaches ultimate permissible limits . . .").

Mr. Justice Clark, in *Progress of Project Effective Justice—A Report on the Joint Committee,* 27 J.Am. Jud. Soc'y 88, 90 (1963) has written: "Nor do we circulate the 'Allen charge' to the new judges as I used to do when heading up the criminal division in the Department of Justice. Allen is dead and we do not believe in dead law." And, a lucid and persuasive critique of *Allen* is found in *Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge,* 53 Va.L.Rev. 123 (1967).

Finally, a distinguished Committee of the American Bar Association chaired by Judge Walter V. Schaefer has prepared American Bar Association Project on Minimum Standards for Criminal Justice, *Standards Relating to Trial by Jury* (May 1968). The House of Delegates of the Association noted its approval, with changes not here relevant, in August. 54 A.B.A.J. 1020-1021 (Oct. 1968). In pertinent part, the Advisory Committee wrote:

> "The decision of the Advisory Committee . . . is based upon a growing body of opinion to the effect that the *Allen* charge and variations thereof are coercive, that they cause serious difficulties for the administration of criminal justice by providing the basis for many appeals and, indeed, that they may now be viewed as an unconstitutional invasion of the province of the jury.
>
> * * * *
>
> "For these reasons, the Advisory Committee has concluded that the *Allen* charge should not be used." *Standards, supra,* 150, 156.

In view of the recent body of criticism, judicial and otherwise, of the "Allen-charge", it is submitted that this Court, for the first time this century should re-examine *Allen* and either justify its continuing validity or finally decree the end of its usefulness.

The charge as given by the trial judge in this case came directly from *Commonwealth* v. *Tuey, supra,* and reads as follows:

> "The mode provided for deciding questions of fact in criminal cases is by a verdict of the jury. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellow jurors; yet in order to bring the minds of 12 jurors to a unanimous result, each juror must examine the question submitted with candor, with a proper regard and deference to the opinions of each other. You should consider that *the case must at some time be decided;* that you are selected in the same manner and from the same source from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to 12 jurors to decide it, or that more or clearer evidence will be produced on the one side or the other. With this view, *it is your duty to decide the case* if you can conscientiously do so.
>
> "In conferring together, you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. On the other hand, *if much the larger* number of your panel are for conviction, *a dissenting juror should consider* whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many jurors equally honest, equally intelligent with himself, and who have heard the same evidence with the same atten-

> tion and with an equal desire to arrive at the truth and under the sanction of the same oath. And, on the other hand, *if a majority are* for acquittal, the minority ought to seriously ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellow jurors." (Emphasis supplied)

The language of the charge is necessarily coercive of the minority of jurors. The jury is told that the minority should listen carefully to the view of the majority, but no balancing provision is made for the majority to be attentive to the views of the minority. The jury is told the case must be decided. Yet, as the Fifth Circuit stated in *Green* v. *United States,* 309 F. 2d 852, 855 (5th Cir. 1962), there is no "legal rule that the majority of jurors have a better judgment than the minority." And, "a mistrial is as much a part of the jury system as a unanimous verdict." Yet, *Allen,* in fact, says that the case must be decided and that the majority must prevail. As Circuit Judge Coleman, dissenting in *Thaggard* v. *United States, supra,* wrote:

> "So, there the previously reluctant juror stands, fancying himself in opposition to the wishes of a United States Judge, which is about the last position in which he ever wanted to find himself. He is only exercising everyday human nature when he gets out of that unhappy predicament just as quickly as he can."

This is too great a price to pay and the petitioners urge this Court to re-examine the merits of the *Allen* charge and to decry the giving of an Allen type charge at a critical time of jury deadlock.

2. Over the vigorous objection of the defendants, the trial court gave a "promotor instruction".[2]

The instruction had the effect of telling the jury that the petitioners were the promotors of the Lakewood Club, that as promotors they stood in a fiduciary relationship to the Club and to present and prospective members, that this fiduciary relationship required the utmost in good faith, full disclosure, no secret profits and, finally, that a breach of their fiduciary obligations was an act of fraud.

The petitioners submit that the application of the promotor fiduciary concept to a criminal mail fraud trial misallocates the burden of proof and permits a conviction not upon a knowing and calculated intent to defraud, but upon something akin to constructive fraud. The giving of this instruction by the trial court, and its approval by the Court of Appeals, below, places the District of Columbia Circuit in direct conflict with *Epstein* v. *United States,* 167 F. 2d 754 (6th Cir. 1949) and with *Shushan* v. *United States,* 117 F. 2d 110, 115 (5th Cir. 1954); see also *Bradford* v. *United States,* 129 F. 2d 274, 276 (5th Cir. 1942).

The most careful analysis of the distinction between constructive fraud, such as might make an individual civilly liable, and the type of conduct required to violate 18 U.S.C. § 1341, is found in *Epstein, supra,* in which the court wrote:

> "Courts speak of actual or active fraud as contrasted with constructive fraud. Actual fraud as being defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right and which accomplishes the end designed. It requires intent to deceive or defraud . . . . To

[2] The Instruction is set forth in full at A.-17a, n.51.

constitute actual fraud there must be such a fraud as affects the conscience . . . . Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public interests. Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place . . . . *It is said that constructive fraud is a term which means essentially nothing more than the receipt and retention of unmerited benefits* . . . .

"In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud."

* * * *

Conceding this to be the rule of law, nevertheless, the government attempts to neutralize its effects by emphasizing that the 'elements of fraud developed in civil cases are applicable in prosecutions under the mail fraud laws.' . . . And use of the mails to defraud is not limited to what would give rise to a common-law action for deceit . . . . *Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases. That, however, is no qualification of the rule that to sustain a charge of using the mails to defraud, there must be proof of an actual fraud, rather than a constructive fraud;* and the fact that the crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means, for instance, that a showing of loss to the victim is not necessary to conviction for mail fraud, it does not imply *that constructive fraud, or anything less than actual fraud, can sustain the charge of using the mails to defraud."* (Emphasis supplied.)

Notwithstanding the efforts of the court below to save the so-called "promotor instruction" by pointing to such words as "knowingly" and "intentionally" (A.-20a), the full tenor of that instruction is to equate nondisclosure, secret profits, and lack of proper use of funds, the classic hallmarks of civil fraud, with the active specific intent to defraud required for violation of 18 U.S.C. § 1341. Other courts have held that any instruction demoting the intent required below a knowing purpose and design to defraud is reversible error. *West* v. *United States,* 68 F. 2d 96, 98 (10th Cir. 1923); *Frank* v. *United States,* 220 F. 2d 559, 565 (10th Cir. 1955). The "promotor instruction" does just that and its use, if approved, will immeasurably broaden the already expansive mail fraud statute. See, by way of anology, *Getchell* v. *United States,* 282 F. 2d 681 (5th Cir. 1960).

3. The Government's testimony showed, *inter alia,* a large sum of money going from the Lakewood complex, through Golf Contractors, Inc., for construction of a Texas club. During the testimony of the petitioner Post and that of one Wayne Freeland, there was evidence introduced of a joint venture agreement between petitioners, on the one hand, and Golf Contractors, Inc., on the other, to construct a golf course at Glen Haven in Texas. There were a series of promissory notes signed personally by Freeland and one Wayne Hayes and, finally, a substitute note for $104,000, made payable to Golf Contractors, Inc., which had been shown to be a wholly-owned subsidiary of petitioners. This note was supported by a deed of trust on the Texas property. All of this occurred prior to the imposition of the conservatorship. *Supra,* p. 4. Subsequent to the conservatorship, at least $82,000 was returned through Golf Contractors, Inc. to the Lakewood Country Club as a result of the prior arrange-

ments which had been made at the time the money was loaned. The court excluded this testimony on the grounds that the return occurred after the imposition of a conservatorship.[3]

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[3] A detailed offer of proof was made:

"I offer to prove through Mr. R. L. Ragsdale, the Vice President of Southern Title Company, Incorporated, that he has been Vice President of the Southern Title Company, Incorporated, since at least 1955, that during the period 1961 and 1962 he was personally acquainted with transactions relating to the Glen Haven Club, Incorporated, of Houston, Texas, which later became Sandy Lakes Country Club, Incorporated, of Houston, Texas, and a contract between that club and Golf Contractors, Incorporated.

"I further offer to prove through this witness, that on or about December 8th, 1961, the Glen Haven Country Club, Incorporated, of Houston, Texas, filed restated and amended articles of incorporation with the Secretary of State of the State of Texas, as a part of which its name was changed to Sandy Lakes Country Club.

"And, as a part of that, I would proffer defendants' exhibit number 346, a certified copy of the amended articles of incorporation, certified to by the Assistant Secretary of State of the State of Texas.

"I would further offer to prove through this witness, that the then Sandy Lakes Country Club of Houston, Texas, caused a loan to be negotiated from the Gibraltar Savings Association in the amount of $500,000.00, that this amount of $500,000.00 plus certain amounts available was disbursed by the Southern Title Company, Incorporated of Houston, Texas, by and under the supervision of this witness, Mr. Ragsdale.

"In that connection, I would offer the disbursement schedule, defendants' exhibit number 343.

"A part of that disbursement schedule is a check in the amount of $82,000.00 dated May 16, 1962, drawn on the Citizens State Bank of Houston, Texas, and made payable to Vinton E. Lee, Sequestrator, Sandy Lakes Country Club Mortgage Note, and bearing on the back the notation "Pay to the Order of Security Bank for Deposit to the Credit of Vinton E. Lee, Sequestrator of Sandy Lakes

The paramount issue in this case, as in virtually every mail fraud case, is the good faith of the defendants and the critical issue to be decided, indeed the only issue, since mailing and loss were clearly established and not seriously contested, is whether the petitioners did everything within their power to produce what

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Country Club Mortgage Note Payable to Golf Contractors, Inc., as a part of Lakewood Country Club, Inc., et al. Court order of January 22, 1962.

"That check is defendants' exhibit number 344 which I would offer as a part of the proffer.

"Following the entry of that check, or the drawing and submission of that check,— Withdraw that, please. Prior to the drawing of that check, this witness, as an officer of the Southern Title Company, would identify a telegram purporting to be signed by Vinton Lee and addressed to Southern Title Company, 1104 Rusk Avenue, Houston, Texas, and which bears the defendants' exhibit number 342, and which reads as follows:

[Reading] 'We are prepared to forward the note to you at the time of settlement so that you may mark it paid and satisfied and return it to the maker in exchange for a check to Vinton E. Lee, Sequestrator, Sandy Lakes Country Club Mortgagee Note.

'The balance of the note payable to Golf Contractors, Inc., from Sandy Lakes Country Club is $82,000.00.'

"It is signed 'Vinton E. Lee, Sequestrator, Sandy Lakes Country Club Mortgage Note'.

"We would offer that telegram as part of the proffer.

"Following the drawing of the check by the Southern Title Company, it was forwarded to Mr. Lee pursuant to a letter signed by this witness, R. L. Ragsdale, and bearing defendants' exhibit number 345, which we would proffer as an offer as a part of this proffer.

"This letter bears the date May 16, 1962. It's addressed to Mr. Vinton E. Lee, Investment Building, Washington, D. C.

[Reading] 'Dear Sir: Pursuant to your telegram of May 4, 1962, to Southern Title Company, we enclose herewith Southern Title Company Check No. 165247 to your order in the amount of $82,000.00, as payment in full of the note pay-

they had promised to produce, i.e. a golf club course on the Lakewood site. As stated in *Lefkowitz* v. *United States*, 230 Fed. 664, 666 (2d Cir. 1921), it is—

> "competent to show *every part and parcel of such business* or the method of conducting it, calcu-

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able to Golf Contractors, Inc., and a release of the mortgage lien securing the payment of said note.'

[Mr. Bergan continuing in the reading of Defendants' Exhibit 345 for identification re proffer of proof.]

'We have consulted Mr. Walter P. Zivley, the trustee in said Deed of Trust, and he has approved your execution of the release of the mortgage lien. Please execute and acknowledge the enclosed release before a Notary Public and return the same, together with the original note marked "Paid" and any other papers you may have relating to this transaction.' It is signed: 'Very truly yours,

R. L. Ragsdale
Vice-President.'

"Following that, Mr. Ragsdale would identify the original of the mortgage note for $104,000.00, dated June 14, 1961. And it bears Defendants' Exhibit Number 347, which we would proffer in evidence as a part of this proffer, marked on the bottom 'Paid May 16, 1962, by Southern Title Company.' And the initials are 'R.L.R.', which this witness would identify as his own.

"Finally, this witness would identify Defendants' Exhibit Number 348—and all of these exhibits which I have mentioned, incidentally, come from this file—which is a Release of Lien filed in the County Courthouse before the County Clerk in and for the County of Fort Bend, Texas, by which this Deed of Trust, Defendants' Exhibit 347, was released, and this Deed of Trust, Defendants' Exhibit 348, is signed by Vinton E. Lee, and it includes one paragraph:

[Reading] 'Whereas, said note is now owned and held by Vinton E. Lee, Sequestrator, and to whom said note has been paid in full.'

"We would offer that document, defendants' exhibit 348, as part of the proffer."

> lated to shed light upon the intent and purposes of its managers." (Emphasis supplied)

Similarly, in *United States* v. *Brandt,* 196 F. 2d 665, 657 (2d Cir. 1952), the court, in reversing a mail fraud conviction, wrote:

> "Culpable intent or lack of good faith is not merely an element of the crime of fraudulent use of the mail, . . . it is in fact practically crucial where, as here, the scheme and the mailing are admitted . . . and hence, since it may be only inferentially proven, 2 *Wigmore on Evidence,* 300, 302, 2d Ed. 1940, *no evidence or actions which bear even remotely* on its probability *should be withdrawn from the jury* unless the tangential and confusing elements interjected by such evidence clearly outweigh any relevancy it might have." (Emphasis supplied)

And see *Little* v. *United States,* 73 F. 2d 861, 867 (10th Cir. 1934):

> "But the question of the good or bad faith of defendant when the letters were mailed was a critical issue of fact. Events occurring after the letters were mailed might shed light upon the intent of defendant when the letters were mailed."

The evidence which the court excluded effectively precluded the petitioners from showing certain acts "calculated to shed light upon [their] intent and purpose." *Lefkowitz* v. *United States, supra.*

The government was permitted to show a large sum of money which went from the Lakewood complex to the Texas club. But the figure was wholly misleading because the money was loaned and returned, as the proffered testimony would have shown. Who knows what impression the jury might have reached had the

petitioners been permitted to show that a valid business arrangement was made and that by far the vast majority of the money thus loaned was returned. Regrettably this was highlighted by the closing argument of Government counsel.

> "We find them sending a net of $93,000.00 and some dollars to their other clubs. When I say their other clubs, I mean Golf Contractors, Inc., ... That, ladies and gentlemen, is a net figure. That take into consideration every dime that came back from those other corporations. $93,000.00 is net."[4]

Thus, a wholly false impression was created by the evidence and the petitioners were not permitted to correct it. Fundamental fairness requires more.

A majority of the court below agreed with the trial court that this evidence was inadmissible. Senior Circuit Judge Fahy, concurring, found it admissible, but did not dissent from affirmance, "deeming this restriction upon the evidence not so harmful as to call for reversals." (A.-21a)

Particularly in view of the government's closing argument, the exclusion of evidence showing that equally large sums came back put an entirely different cast upon the case than the facts warranted. While we need not, and do not, argue that this evidence would have been dispositive of guilt or innocence, it is a fact that the jury was in conference for more than twenty hours, that they returned once to have the entire charge read, and that they returned later to announce a deadlock. Under such circumstances, it was prejudicial error not to admit this evidence.

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[4] A motion for mistrial was made and denied.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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